

Congress Calls on FTC to Protect Americans from Price Gouging During COVID-19 Health Crisis

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On March 17, 2020, key Members of the House of Representatives sent a letter to the Chairman of the Federal Trade Commission (FTC), urging the Commission “to take immediate action to protect consumers from price gouging during this [COVID-19] declared public emergency.” The letter was sent to FTC Chairman Joseph Simons from the chairs of the committees and subcommittees with jurisdiction over the FTC: House Energy & Commerce Committee Chairman Frank Pallone (D-NJ); Consumer Protection and Commerce Subcommittee Chairwoman Jan Schakowsky (D-IL); Judiciary Committee Chairman Jerrold Nadler (D-NY); and Antitrust, Commercial, and Administrative Law Subcommittee Chairman David Cicilline (D-RI).

The letter cites press reports, including an [article](#) in the *New York Times*, of individuals who have purposefully stocked critical medical and household supplies, such as masks and hand sanitizer, in order to resell online at drastically inflated prices. The letter notes that because such items are in critical shortage, frontline health officials who treat patients with COVID-19 “are being asked to reuse personal protective equipment” and many American consumers “are unable to find essential household items” on store shelves. Online retail platforms such as Amazon and eBay have reportedly cracked down on such conduct.

The FTC’s Authority

Though the letter does not cite the FTC’s specific authority to bring enforcement actions against price gouging, the Commission has broad authority under the Federal Trade Commission Act (FTC Act) and federal antitrust laws to enforce against anticompetitive conduct in the marketplace. Section 5 of the FTC Act broadly prohibits “unfair methods of competition”, which the FTC may enforce as a standalone provision or as a violation of either the Sherman Act or the Clayton Act. Though the Commission cannot directly enforce the Sherman Act, it can do so through the FTC Act insofar that violations of the Sherman Act are also unfair methods of competition in violation of section 5. In general, the Sherman Act prohibits monopolies and anti-competitive collusive practices, such as price fixing. The FTC also enforces the Clayton Act, which largely addresses uncompetitive mergers and acquisitions.

The contours of unlawful misconduct under section 5 as a standalone provision has always been murky. That is, Congress’s intent in prohibiting “unfair methods of competition” outside of commercial conduct prohibited by the Sherman and Clayton Acts is unclear. The FTC has infrequently invoked its authority under section 5. In 2015, the Commission issued [enforcement principles](#) stating that it would challenge conduct as violations of section 5 taking into account “the promotion of consumer welfare” and whether the Sherman or Clayton Acts are sufficient in themselves as a legal basis for enforcement. The Commission also cited “the rule of reason” stating that unlawful conduct “must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications”.

Lastly, the FTC has broad authority under section 5 of the FTC Act to enforce against “unfair or deceptive acts or practices”, which serves as the bedrock of federal consumer protection law.

Possible Congressional Response

Whether the Commission will seek enforcement actions against businesses or individuals for price gouging in the midst of the current public health emergency is unclear. For this reason, the authors of the letter state that they “will continue to pursue other measures, including legislation, to assist [the FTC’s] efforts and help consumers”. Congress has considered price gouging legislation in the past – specifically, regarding gasoline prices in the wake of Hurricane Katrina -- but the measure never became law. Furthermore, though federal law does not specifically prohibit price gouging, many state laws do. The statutes vary in their definitions and scope, but usually prohibit “unconscionable” or “excessive” price hikes during a declared state of emergency. Some states establish a specific threshold increase – such as 10% or 25% -- and limit the scope of covered products to commodities such as gasoline or “household essentials”. Were Congress to consider federal price gouging legislation to address critical shortages of medical and cleaning supplies, it may draw from these existing state laws.

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